NO. 48742-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

vs.

SHANE JACKMAN,

Appellant.

BRIEF OF RESPONDENT

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B. Whether the charging document was defective as to Counts I and II and those specific charges should be reversed?

C. Whether this Court should impose appellate costs due to Defendant's alleged indigency?

D. Whether the concerns contained in Appellant's Statement of additional Grounds for Review are adequately addressed by Appellate Counsel's brief, and further response is not required?

II. STATEMENT OF THE CASE

On December 2, 2015, at approximately 6:00 p.m., Sgt. Pernsteiner met with Deputy Newman in Quilcene, Washington to investigate a possible stolen phone and vehicle in Brinnon. RP 5, 29. Both deputies were employed by the Jefferson County Sheriff's Office and were on duty at the time. *Id.* Deputy Newman had approximately 10 years of law enforcement experience, and Sgt. Pernsteiner had approximately 18 years of law enforcement experience. *Id.*

The stolen phone was an iPhone that had been in an Acura Integra that was also reported stolen. RP 30. The Acura Integra had after-market

black-rimmed tires. RP 33. The owner of the phone used a software application to locate his missing phone. RP 30. The application indicated the phone was at 512 Seal Rock Road, in Brinnon, Washington. RP 30.

The deputies travelled to 512 Seal Rock Road and discovered a vacant vacation home. RP 6, 31. The deputies arrived after it was already dark. RP 40. Across the street at 304694 U.S. Hwy. 101, the deputies observed a residence that had two separate buildings; a house and a separate garage/accessory dwelling unit (ADU) with a light on. RP 6 – 9, 15, 31. After examining other areas nearby, the deputies pulled in front of the Hwy. 101 address and parked their patrol vehicles. RP 31, 32.

The residence at 304694 U.S. Hwy. 101 is on the west side of Hwy. 101 and has a circular gravel driveway that forks shortly before connecting with Hwy. 101. Supp. CP 1, 2 & 3. As seen from Hwy. 101, the driveway continues up straight to the main residence. *Id.* The driveway also branches to the south (which is left as seen from the highway). *Id.* The driveway travels in front of the garage/ADU before circling around behind the garage/ADU to connect with the part of the drive that heads straight to the house. *Id.* The part of the driveway that heads south is less steep and branches again near a parking area in front of the garage to service another residence behind the 101 residence. *Id.*

Deputy Newman had been to this residence numerous times. RP 26. Based on his prior observations, the typical traffic flow is for cars to

pull into the driveway on the south side then pull up in front of the garage/ADU. RP 26, 27.

The deputies went to the 101 residence to inquire about the missing iPhone. RP 30 - 32. As the deputies approached the garage/ADU, they noticed one car parked along the portion of the driveway that heads south and two additional cars in a parking area in front of the garage door. RP 39. One of the cars was an Acura Integra, similar to the car that was reported stolen. RP16 – 17, 33. The other car was a green Honda Accord. RP 17, 33, 41.

The garage door on the ADU faces south and a sliding glass door on the north side of the building faces east towards Hwy. 101. Supp. CP 3.

The Acura Integra had a different color than that of the car reported stolen. RP 33. It also appeared as if it was in the process of having black after-market wheels installed. RP 33. The victim's vehicle also had black after-market wheels. RP 33. The Acura Integra had a license plate and registration. RP 40. The Honda Accord did not have a license plate. RP. 10, 33. This raised the suspicion of the deputies who were following up in part on a report involving a stolen car. RP 10, 42.

The garage that the cars were parked in front of had a security light activated by motion sensor. RP 18. Immediately beneath the light was a "No Trespassing" sign. Supp. CP 4. The deputies activated the security

light as they approached the vehicles. RP 42. Neither deputy observed the "No Trespassing" sign. RP 12, 34.

The front of the Honda Accord was facing the garage. RP 42. Sgt. Pernsteiner walked from the shared driveway up the length of the Honda Accord until he could view the Vehicle Identification Number (VIN) through the windshield using the light provided by the security light. RP 42.

Sgt. Pernsteiner wrote down the VIN and then reported it to dispatch. RP 34, 42 – 43. Dispatch informed Sgt. Pernsteiner that the VIN belonged to a car that had been reported stolen. RP 43.

Sgt. Pernsteiner then walked around to the ADU's "front door," a sliding glass door with a light on (northeast side of the building). RP 20, 34. Deputy Newman continued to follow the driveway around the garage/ADU such that he was on the opposite side of the building that had the sliding glass door, where another door existed. RP 19.

Sgt. Pernsteiner knocked on the sliding glass door and Mr. Jackman answered. RP 20. When Mr. Jackman opened the door, Sgt. Pernsteiner said he was there for the phone. RP 35. Mr. Jackman said, "let me go get it." RP 35. Mr. Jackman then retrieved the phone and presented it to Sgt. Pernsteiner. RP 35. Sgt. Pernsteiner confirmed it was the stolen phone by accessing the phone with a code given to him by the phone's owner. RP 35.

Sgt. Pernsteiner asked Mr. Jackman if he would step outside so he could talk to him. RP 21, 36. Mr. Jackman complied and spoke to Sgt. Pernsteiner about cars in the parking area in front of the garage door. RP 36. Mr. Jackman was cooperative, admitted that the car was stolen, and informed the deputies of some other stolen items that were on the premises. RP 22, 45. Mr. Jackman was then placed under arrest. RP 21, 36.

The deputies indicated that they intended to go to the garage/ADU to inquire about the phone regardless of whether or not any vehicle had been present in the driveway. RP 28, 36 - 37.

Mr. Jackman never informed the deputies that they were trespassing and needed to leave the property. RP 12. 37.

III. ARGUMENT

A. The Trial Court properly denied Appellant's Motion to Suppress as officers acted properly in searching within the curtilage of Appellant's home.

Generally "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search'" as understood by the Fourth Amendment. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). An officer inside the curtilage of a residence does not automatically amount to an invasion of privacy. *Id.* at 902. Moreover, police on legitimate business may enter

onto the property of another via routes that are *impliedly* open, as would a reasonably respectful citizen. *Id.* (emphasis added). The implied invitation is exceeded when "a substantial and unreasonable departure from [an impliedly open access route], or a particularly intrusive method of viewing", *Id.* at 903.

1. Sgt. Pernsteiner and Deputy Newman accessed the residence as would reasonable respectful citizens and did not make a substantial and unreasonable departure.

A police officer with legitimate business may enter areas in the curtilage[1] of a residence that are impliedly open using access routes to the area. *State v. Ague-Masters*, 138 Wn. App. 86, 97-98, 156 P.3d 265 (2007). However, the officer is expected to act as would a reasonably respectful citizen. *Id.* Whether a portion of the curtilage is impliedly open depends on the totality of the circumstances surrounding the deputies entry. *Id.* at 98. Absent a clear indication that the owner does not expect uninvited visitors, an access route is deemed to be impliedly open to the public. *Id.* In *Ague-Masters* Thurston County sheriff deputies entered on to a residence belonging to the defendant looking for an individual with another individual with an active arrest warrant. *Id.* at 92. The deputies drove through an open cattle gate, 50-75 feet

[1] The land or yard adjoining a house, usually within an enclosure. *Black's Law Dictionary* (9th ed. 2009).

down the drive way, **and passed a No Trespassing sign** on the way[2]. *Id.* at 93. When no one answered the front door they walked around to the rear of the residence. *Id.* Based on what was uncovered at the residence the defendant was ultimately charged with manufacturing a controlled substance. *Id.* 93-96.

On appeal, this Court ruled that the officers' presence on the defendant's property was permissible because the gate was unlocked, the driveway unobstructed, it was during daylight hours, and none of the officers indicated that they were able to see the No Trespassing sign with certainty. *Id.* at 99. The court found that deputies acted in the manner of a reasonable, respectful citizen in that such a citizen would believe that they could drive through the open gate, down the driveway, "despite the possible presence of the sign in the tree". *Id.* Furthermore, that they did not exceed the scope of the implied invitation when they walked up the house, knocked on the door, and then walked around to the rear of the residence. *Id.*

The present case is nearly identical to *Ague-Masters*, except that where the officers in *Ague-Masters* were uncertain as to whether they observed a No Trespassing sign. In the present case both deputies testified with certainty that they did not observe such a sign. However,

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[2] It is unclear as to whether the deputies were aware of the sign or not.

where in *Ague-Masters* the officers ended up walking around the residence, in the current case the deputies walked up the driveway, paused to look at the car, and then continued up to the defendant's front door. It stands to reason that if the officers in *Ague-Masters* did not make a substantial and unreasonable departure by walking past a gate, past a no Trespassing sign, that may or may not have been observed, up to the defendant's front door, and then around to the rear of the residence, that officers in the present case did not either. Walking up a person's driveway up to their front door does not constitute a substantial and unreasonable departure from the actions of a reasonably respectful citizen.

2. The deputies were conducting legitimate police business.

Police officers are conducting legitimate police business if they enter on to private property to speak with the occupants as part of an investigation. *State v. Ross*, 141 Wn.2d 304, 313-14, 4 P.3d 130 (2000). In *Ross,* the court held that police officers conducting an investigation into criminal activity are conducting legitimate police business. *Id.* 135-36. However, officers searching a property for evidence to include in a search warrant affidavit are not conducting legitimate police business. *Id.*

In the present case Sgt. Pernsteiner and Deputy Newman were on legitimate police business. As with *Ross*, they entered on to private property to speak with occupant of a home as part of an investigation. The owner of a missing iPhone pinged his phone earlier that day at a neighboring address. When it appeared that the address was an abandoned residence the officers logically went to the neighboring house. On the way to the house they observed a car similar to the one that had been reported stolen and upon reporting the VIN learned that it too was stolen. From there, the deputies went on to the front door of the residence where they contacted the defendant.

3. *Florida v. Jardines*[3] distinguishable.

Mr. Jackman asserts that the trial court's ruling is inconsistent with *Jardines*. *Jardines* is distinguishable from the case at bar. In *Jardines* law enforcement received an unverified tip that marijuana was being grown at the Jardines' residence. 133 S.Ct. at 1415. A month after the tip the Miami Police Department and the Drug Enforcement Administration set up surveillance. *Id.* Investigators approached Mr. Jardines' home with a drug sniffing dog. *Id.* The dog alerted for illicit drugs. *Id.* Officers then backed away and obtained a warrant to search the premises. *Id.* Mr. Jardines attempted to flee, was arrested, and with

[3] *Florida v. Jardines*, —— U.S. ——, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

the search warrant, officers located marijuana plants in the residence. *Id.* Mr. Jardines was subsequently charged with trafficking in cannabis. *Id.*

In his successful challenge to the search, and in discussing customary invitations to enter the property of another the Court Stated:

> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.

Id. at 1416. In the present case, Mr. Jackman was 1) merely contacted as it related to a theft investigation in that area of Jefferson County – unlike Mr. Jardines whose home was specifically targeted; 2) Mr. Jackman was not a suspect of any ongoing criminal investigation as was Mr. Jardines; 3) Police did not use any heightened "tools" to investigate the scene (merely took advantage of a motion sensor light that illuminated the dash of a car to see the VIN) – unlike the use of a drug sniffing dog in the *Jardines* case.

Justice Kagan, in her concurrence stated things a bit more directly:

> For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the

> front door of your home carrying super-high-powered binoculars. See ante, at 1416, n. 3. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

Id. at 1418. Here we have no conduct by police even remotely approaching this type of behavior.

4. *Daugherty*[4] of questionable value to analysis herein.

In *State v. Daugherty* the Court wrestled with the search and seizure of a safe located at Mr. Daugherty's home and the product of a burglary from his workplace. Ultimately the Court determined the seizure of the safe was the product of an unlawful search. *Id.* at 265. However, in reaching that decision the Court felt compelled to insert its own judgment of the facts despite the trial court determination that the officers were in a lawful location due to officer safety concerns:

> The State contended at the suppression hearing that the intrusion was lawful because there were "exigent circumstances" requiring safety precautions against the chance a

[4] *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980), *rejected* by *State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994).

> concealed accomplice might present a danger to the officers. The trial court agreed, concluding the officers' suspicion that an accomplice was involved was reasonable. While the findings of the trial court following a suppression hearing are of great significance to a reviewing court, the constitutional rights at issue require us to make an independent evaluation of the evidence.

Daugherty at 269.

This "independent evaluation" approach was later rejected in *State v. Hill*:

> Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.
>
> This well-established rule has not been consistently followed, however, in review of facts following a suppression *645 motion. There is a line of cases holding that although the trial court's findings following a suppression motion are of great significance to the reviewing court, the fundamental constitutional rights involved require the appellate court to undertake an independent evaluation of the evidence. See e.g., In re McNear, 65 Wash.2d 530, 537, 398 P.2d 732 (1965) (first Washington case involving suppression of evidence seized during search which holds that the appellate court must make an independent evaluation of evidence).
>
> The history behind the rule requiring an independent evaluation of the evidence reveals that it is an anomaly in Washington law and should be discarded.

Hill at 644 – 645 [citations omitted].

Based on the ruling in *Hill* and the underlying facts the trial court found in *Daugherty*, it is questionable now whether *Daugherty* stands for the proposition the defense asserts. Much to the contrary,

had *Hill* applied retroactively, it is likely the trial court decision to deny Mr. Daugherty's suppression motion would have been affirmed by the appellate courts.

In analyzing the propriety of the officers actions in the present case, the language of *Seagull* remains useful:

> This "open view doctrine" is to be distinguished from the visually similar, but legally distinct, "plain view doctrine". As noted in State v. Kaaheena, 59 Haw. 23, 28-29, 575 P.2d 462, 466-67 (1978):
>
> > In the "plain view" situation "the view takes place after an intrusion into activities or areas as to which there is a reasonable expectation of privacy." The officer has already intruded, and, if his intrusion is justified, the objects in plain view, sighted inadvertently, will be admissible.

Seagull at 901 – 902 [citations omitted].

Seagull continues:

> The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. ... *However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.*
>
> What is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case. Thus, it is instructive to review comparable cases from other jurisdictions to determine what has been considered reasonable police behavior. Such a review makes it clear that substantially more intrusive police conduct than that which occurred here has been held constitutionally permissible. Further, in those comparable cases wherein the evidence was ultimately suppressed, police conduct was substantially more intrusive than that in the instant case.

Id. at 902 – 903 [citations omitted, emphasis added].[5]

The trial court did not view Deputy Pernsteiner's actions as a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing such that it exceeded the scope of the implied invitation to enter onto Mr. Jackman's property (more technically his mother's property). This Court does not need to do so either.

B. The charging document was defective as to Counts I and II and those specific charges should be reversed.[6]

In the Second Amended Information the State charged Mr.

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[5] Fn. 2 from page 903 of the Seagull decision [cases where evidence was not suppressed]: See, e. g., United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), cert. denied (officer on his knees using a flashlight looked into garage abutting street through an 8 to 9 inch gap between door and frame); People v. Bradley, 1 Cal.3d 80, 460 P.2d 129, 81 Cal.Rptr. 457 (1969) (police investigating informant's tip went into fenced-in back yard at night); People v. Superior Court, 33 Cal.App.3d 475, 109 Cal.Rptr. 106 (1973) (while approaching house to arrest suspect officers looked through cracks in the door of an attached garage for no particular reason, and saw contraband); People v. Willard, 238 Cal.App.2d 292, 47 Cal.Rptr. 734 (1965) (officers secretly on back porch looked through bathroom window); People v. Steffano, 177 Cal.App.2d 414, 2 Cal.Rptr. 176 (1960) (officer secretly looked in window of rear door which had drawn shade which was worn and frayed); McDougall v. State, 316 So.2d 624 (Fla.Dist.Ct.App. 1975) (officer stood on box to look in window, shone flashlight into room); State v. Brighter, 60 Haw. 318, 589 P.2d 527 (1979) (officer went to shade tree in backyard to rest, saw marijuana patch not then visible from public areas); State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975) (one officer shone flashlight through basement window, while another peered through small hole in cloth covering a garage window); State v. Gott, 456 S.W.2d 38 (Mo. 1970) (officers were at residence looking for suspect on informant's tip); Bies v. State, 76 Wis.2d 457, 251 N.W.2d 461 (1977) (officers went around garage on private property attempting to see in, using flashlight). It should be noted that these cases are cited for illustrative purposes only. We do not necessarily agree with the results reached in all cases.

[6] Though the State concedes error on this point, the concession will be of little comfort to Mr. Jackman as it will not change his sentence unless this Court grants Mr. Jackman all the relief he requests. At sentencing, Mr. Jackman had 13 offender points not counting "other current offenses." CP 106 – 114. His standard sentence range on Count III, Theft of a Motor Vehicle was 43 – 57 months. *Id.* If that charge survives but with the two "other current offenses" removed, his standard range remains the same. *Id.* Although he received a prison based DOSA, the time imposed was consistent with a standard range sentence of 43 – 57 months. *Id.*

Jackman with two counts of Possession of a Stolen Motor Vehicle, one count of Theft of a Motor Vehicle, and one count of Possessing Stolen Property in the Third Degree. CP 33 – 34. With respect to Counts I and II, Mr. Jackman asserts that the Second Amended Information improperly omitted the *mens rea* requirement – that Mr. Jackman had knowledge the vehicle(s) was/were stolen. *Brief of Appellant*, at p. 28.

The State agrees and concedes that the *mens rea* element, a necessary element of the crime charged, was omitted from the Second Amended Information. Further, the State concedes that based on even a "quite liberal" construction of the charging language, no reasonable argument can be made that such language can be implied to exist. For the reasons expressed in Appellant's Brief, and the reasoning within *State v. Porter*, 186 Wn.2d 85, 375 P.2d 664 (1998) and *State v. Moavenzadeh*, 135 Wn.2d 359, 956 P.2d 1097 (1998), the Possession of a Stolen Motor Vehicle charges in Counts I and II, should be reversed.

C. The State lacks sufficient information to determine whether this Court should impose appellate costs due to Appellant's alleged indigency.

The State is not in possession of any financial records for Mr. Jackman and cannot adequately address his ability to pay the appellate costs herein. As a general matter of policy, the Jefferson County

Prosecuting Attorney's Office as currently constituted, does not believe the costs of the judicial system should be borne by those that are indigent.

D. The concerns contained in Appellant's Statement of Additional Grounds for Review are adequately addressed by Appellate Counsel's brief, and further response is not required.

Mr. Jackman raises two additional issues in his Statement of Additional Grounds for Review. Namely that 1) the State did not adequately establish an exception to the warrant requirement existed justifying the underlying search and, 2) the Trial Court improperly disregarded evidence demonstrating Mr. Jackman's expectation of privacy at his residence.

The State believes these issues are adequately addressed in the first section of the State's response.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 10th day of February, 2017.

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PROOF OF SERVICE

I, Sarah Martin, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Jennifer Winkler, WSBA #35220
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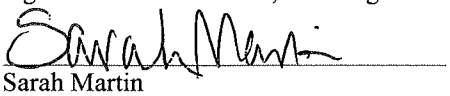
I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 10th day of February, 2017, and signed at Port Townsend, Washington.



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